A

LAU SUET WAN v. HONG LEONG ASSURANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA SAM J
[CIVIL APPEAL NO: 12B-683-12-2012]
13 NOVEMBER 2014

B

INSURANCE: *Claims – Lapse of time – Insured person took two life insurance policies before going missing and named wife as nominee – Wife claimed under policies from insurance company – Requirement set by insurance company that wife must produce court order to confirm husband was missing and statutorily presumed dead – High Court order pronouncing husband was missing and presumed dead obtained by wife – Insurance company refused claim stating policies had lapsed – Whether wife notified of lapse – Whether wife entitled to claim under policies*

C

The appellant's ('the plaintiff's) husband ('Elvis') had taken two life insurance policies from the respondent ('the defendant') namely: (i) a Level Term Life Insurance Policy for the sum assured of RM10,000 commencing from 15 February 2001; and (ii) a Venture Life Insurance Policy for the sum assured of RM200,000 commencing from 4 March 2002 ('IL and UL policies'). The plaintiff was named as the nominee for both policies. Elvis had been missing from home since 12 December 2002 and both policies were still in force in December 2002. When the plaintiff claimed for the insurance from the defendant, the plaintiff was informed by the defendant *via* a letter dated 19 August 2005 ('the letter') that she must produce a court order to confirm that Elvis was missing and statutorily presumed dead. The plaintiff then obtained a High Court order pronouncing that Elvis was presumed dead and it was proved that Elvis had not been heard of for the past seven years since 2002 by those who would naturally have heard of him if he had been alive. In refuting the claim, the defendant argued that both the IL and UL policies had lapsed on 15 May 2004 and 4 September 2004, respectively. The Sessions Court dismissed the plaintiff's claim on the ground that the plaintiff had failed to prove that Elvis had died on any particular time within the seven years period. Hence, the present appeal.

D

E

F

G

Held (allowing appeal; setting aside decision of Sessions Court):

(1) The defendant did not mention anything about the expiry of both policies or the non-payments of the premiums in the letter. They only requested the plaintiff to produce court order to declare and confirm that Elvis was missing and statutorily presumed as dead before any death claim could be adduced. There was also no evidence adduced by the defendants that they had notified the plaintiff about the non-payments of the policies. (para 24)

H

I

(2) The defendant encouraged/represented that the claim could be assessed when the plaintiff produced a court order to declare and confirm that Elvis was missing and statutorily presumed as dead. For this, the

plaintiff had to wait for seven years since Elvis had disappeared. The defendant did not inform the plaintiff that the policies had lapsed or that the plaintiff was required to maintain the policies until after seven years. In reliance to the said representation, the plaintiff altered her position to her detriment by waiting for seven years to make the application and obtain the court order. However, the defendant raised new grounds which were never raised at the material time, in order to avoid having to pay on the said policies. (paras 28-29)

(3) The defendant is estopped from insisting on their legal rights to raise all other issues as raised in their defence which were not at all stated in the letter. If the defendant had raised it in the letter, the plaintiff would not have altered her position. Although detriment is not part of the principle of estoppel, the plaintiff had suffered detriment and hence, justice of this case would require that equitable estoppel should be applied more forcibly against the defendant to estop them from insisting on their legal rights. The defendant's letter would also give rise to a legitimate expectation to the plaintiff that the defendant would honour the promise/representation made. (paras 29 & 32)

(4) The presumption of law, *via* the High Court order, was that Elvis had died and the presumption had not since been rebutted by the defendant when this proceeding was heard before the court because at that time, no proof and no sign of him had been forthcoming. If the defendant alleged that Elvis was still alive, it was for the defendant to bring proof that Elvis was not dead. (paras 36 & 38)

(5) If the defendant alleged that the IL and UL policies had lapsed due to non-payment of premium, the defendant should have informed the same to the plaintiff at the very least. The defendant however, through its witness who had no personal knowledge, claimed that the premium and lapse notices were allegedly sent but they chose not to produce the said notices by making some lame excuse that purportedly the system had changed. Therefore, it warranted the inference that any such evidence, if produced by them, would have been adverse to the defendant's case as provided for under s. 114(g) of the Evidence Act 1950. (para 45)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

In Re Application of Tay Soon Pang; Ex P [2009] 9 CLJ 778 HC ***(refd)***

LIC of India v. Anuradha [2004] 4 Madras Law Journal 94 ***(refd)***

R Muthu Thambi v. K Janagi [1955] 1 LNS 106 HC ***(refd)***

Re Gun Soon Thin [1997] 2 CLJ Supp 53 HC ***(refd)***

Re Osman Bachit [1997] 2 CLJ Supp 269 HC ***(refd)***

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 107, 108, 114(g)
Rules of Court 2012, O. 55 rr. 2, 3(4)

For the plaintiff - Nur Hakimah Mohamad Nur; M/s Jasbeer, Nur & Lee
For the defendant - Christopher KF Foo; M/s Raja, Darryl & Loh

[Appeal from Magistrate's Court; Summons No: 52-17336-05-2012]

Reported by Najib Tamby

JUDGMENT

Zakaria Sam J:

[1] In this appeal, for ease of reference, the appellant and the respondent would be referred to as the plaintiff and defendant respectively.

The Appeal

[2] This is the plaintiff's appeal against the decision of the learned Sessions Judge on 26 October 2012, in dismissing the plaintiff's claim for RM210,000 under two insurance policies taken out by her husband, where she was named the nominee, after a full trial.

[3] Elvis Keh Siang Long ('Elvis'), the plaintiff's husband had taken two life insurance policies from the defendant, that is:

(i) A Level Term Life Insurance Policy No. IL20010322430 ('IL Policy'), commencing from 15 May 2001 for the sum assured RM10,000; and

(ii) A Venture Life Insurance Policy No. UL200200131633 ('UL Policy'), commencing from 4 March 2002 for the sum assured of RM200,000.

[4] Elvis has been missing from the time he left his house on 12 December 2002 and has never been found despite all efforts to trace him and the plaintiff had lodged a police report dated 13 December 2002.

[5] Both the policies were still in force in December 2002.

[6] The plaintiff through the defendant's agent, Mr Simon Lee had notified that the plaintiff was making a claim to the defendant on the said policies.

[7] By a letter dated 19 August 2005 the defendant informed the plaintiff that:

> Before any death claim can be assessed, you have to produce court order to declare and confirm that the life assured was missing and statutory presumed as dead.

[8] On 3 January 2011, the plaintiff obtained an order from the Kuala Lumpur High Court ('the court order') which pronounced that Elvis was presumed to be dead and it is proved that Elvis has not been heard of for seven years since 2002 by those who would naturally have heard of him if he had been alive.

[9] The plaintiff claims that she had met the pre-requisites provision requirement that proves that Elvis had died.

Defence Case

[10] By a letter from its solicitors dated 13 September 2011, the defendant informed the plaintiff's solicitor that, upon investigating the claim, the defendant discovered that both the IL Policy and UL Policy had lapsed on 15 May 2004 and 4 September 2004 respectively.

[11] To succeed in her claim, the plaintiff had to show that her husband passed away whilst the policies were in force (that is, before 15 May 2004 in the case of the IL Policy and before 4 September 2004 in the case of the UL Policy). For any claim for benefits under an insurance policy arising from the death of a life assured, it is fundamental that a claimant should prove that the death of the life assured occurred whilst the insurance policy is still in force.

[12] The only evidence offered by the plaintiff regarding the death of Elvis was the court order where:

(a) The court order merely presumed that Elvis was dead as at the date of the court order, ie, 3 January 2011;

(b) The court made no presumption as to when Elvis passed away; and

(c) The court order made no presumption that Elvis had died at any time before the date of the court order.

[13] No other evidence having been offered by the plaintiff as to when her husband actually passed away.

[14] As to the lapsing of the policies, the plaintiff had confirmed in her oral testimony during the trial that the last premium paid by her for the IL Policy was in May 2003 and that the last premium paid by her for the UL Policy was in January 2004.

[15] After a full trial, the learned Session Judge had on 26 November 2012 dismissed the plaintiff's claim on the ground that the plaintiff had failed to prove her case that Elvis had died on any particular time within the seven years period.

[16] Hence, this appeal by the plaintiff.

Preliminary Objection

[17] The objection raised by the defendant is that the notice of appeal served by the plaintiff on them was out of time by one day. The defendant applied to court to strike out the notice of appeal as it did not comply with O. 55 rr. 2 and 3(4) of the Rules of Court 2012.

[18] The notice of appeal was filed within time ie, on 10 December 2012 but the service of the said notice of appeal was only done on 11 December 2012, ie, one day outside the stipulated time, the delay to me is not inordinate or would cause any prejudice to the defendants. I dismissed the objection.

The Law

[19] Section 107 and 108 of the Evidence Act provides:

> 107. Burden of proving death of person known to the have been alive within 30 years
>
> When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.
>
> 108. Burden of proving that person is alive who has not been heard of for 7 years
>
> When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms.

[20] Section 107 deals with the presumption of continuance of life and s. 108 deals with the presumption of death.

[21] Section 108 is a proviso to s. 107 and embodies the rule as to the counter-presumption of death from not being heard of for seven years. If it is proved that a man was absent from home for seven years at a stretch and no news had been received of him by persons interested in him, the presumption of continuance of life comes to an end and under s. 108 the burden of proof is shifted to the person who affirms that he is not dead.

[22] Presumption is not to the time or date of death. The exact of time of death is not a matter of presumption but of evidence and the onus of proving that death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential: See *Re Osman Bachit* [1997] 2 CLJ Supp 269; [1997] 4 MLJ 445; *R Muthu Thambi v. K Janagi* [1955] 1 LNS 106; [1955] 21 MLJ 47; *Re Gun Soon Thin* [1997] 2 CLJ Supp 53; [1997] 2 MLJ 351 and *In Re Application of Tay Soon Pong; Ex P* [2009] 9 CLJ 778.

Findings

[23] The plaintiff through the defendant's said agent, Mr Simon Lee had notified the defendant that the plaintiff was making a claim to the defendant on the said policies. Subsequently, the defendant had replied by writing a letter dated 19 August 2005 to the plaintiff (at p. 171 of rekod rayuan bahagian C) which I produce below:

19th August 2005

Lau Suet Wan

…

Dear Madam

POLICY NO. : UL200200131633

LIFE ASSURED : ELVIS KEH JIANG LONG

We refer to your claim notification together with police report submitted to us by the Agent, Simon Lee.

As per the said police report dated 13th December 2002, the Life Assurance was missing for 2 years and 8 months since 12th December 2002.

Before any death claim can be assessed, you have to produce court order to declare and confirm that the Life Assured was missing and statutory presumed as dead.

For your information, the statutory period for such presumption subject to a minimum period of missing for 7 years and other request as the court may require. Hence, at this juncture we are unable to deal with the matter.

Should you require further information, please do not hesitate to contact us.

Thank you.

Yours faithfully,

For HONG LEONG ASSURANCE BERHAD

Sgd

Leong Pooi Fun
Section Head-claims
Life Division

[24] In this letter the defendant did not mention anything about the expiry of both policies or the non-payment of the premiums. Neither was any evidence adduced by the defendants that they had notified the plaintiff about the non-payments of the policies. Instead, they requested the plaintiff to produce court order to declare and confirm that life assured was missing and statutorily presumed as dead before any death claim can be assessed.

[25] In response to the aforesaid letter dated 19 August 2005, the plaintiff had filed an application for a declaration of presumption of death pursuant to s. 108 on Elvis *vide* High Court of Malaya at Kuala Lumpur Originating Summon No. S-25-3-2010. On 3 January 2011 the High Court has allowed the said application and pronounced that Elvis was presumed to be dead and it is proved that Elvis has not been heard of for seven years since 2002 by those who would naturally have heard of him if he had been alive and meet the pre-requisite provision requirements proves that he had died.

[26] Reproduced below is the said order of the High Court:

> Dalam Mahkamah Terbuka
> Di hadapan Yang Arif Hakim
> John Louis O'Hara
> Pada 3 Januari 2011
>
> PERINTAH
> (Lampiran II)
>
> ATAS USUL PEMULA yang dibuat (secara *ex parte*) MAKA ADALAH DIPERINTAHKAN bahawa Elvis Keh Jiang Long (No. P/P: S6801385B) dianggap telah mati sebabkan dibuktikan tiada apa-apa khabar yang telah didengar mengenai Elvis Keh Jiang Long (No/P/P:S6801385B) sejak 2002 oleh orang yang sepatutnya mendengar secara lazimnya khabar mengenainya jika dia masih hidup dan ianya sudah melebihi tujuh (7) tahun dan menepati kehendak prasyarat peruntukan membuktikan bahawa Elvis Keh Jiang Long telah meninggal dunia.
>
> t.t.
> Penolong Kanan Pendaftar
> Mahkamah Tinggi
> Kuala Lumpur

[27] The said High Court order was served on the defendant by way of letter dated 20 May 2011 and was acknowledged receipt by the defendant on 23 May 2011. This fact is undisputed.

[28] In the defendant's letter 19 August 2005, the defendant encouraged/represented that the claim can be assessed when the plaintiff produces a court order to declare and confirm that the life assured was missing and statutorily presumed as dead. For this the plaintiff has to wait for seven years since Elvis had disappeared. In this letter, there was no mention that the policies had lapsed or that the plaintiff is required to maintain the policies until after seven years.

[29] In reliance on the said representation, the plaintiff had altered her position to her detriment. The plaintiff waited for seven years, made the application and obtained the court order as required by the defendant and delivered the same to the defendant but the defendant has now raised new grounds which were never raised at the material time, in order to avoid having to pay on the said policies. This would give rise to an equitable estoppel and the defendant would be estopped from insisting on their legal rights to raise all other issues as raised in their defence which were not at all raised or stated in their letter dated 19 August 2005. If the defendant had raised it as such in their letter, the plaintiff would not have altered her position as aforesaid. Though detriment is not part of estoppel principle yet in this case, the plaintiff has suffered detriment and hence the justice of this case would require that the equitable estoppel should be applied more forcibly against the defendant to estop them from insisting on their legal rights.

[30] In *Boustead Trading (1985) Sdn Berhad v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331, it was held that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

[31] In this instant appeal, even though estoppel was not pleaded, yet, it is clear from *Boustead*'s case that it is sufficient if the material facts giving rise to the estoppel were sufficiently pleaded without actually using the term 'estopped'. In my opinion, the reference to the letter dated 19 August 2005 in their statement of claim and the plaintiff's reliance thereon by waiting for seven years, applying for and obtaining court order under s. 108 as required by the defendant would be sufficient facts to give rise to equitable estoppel. A court may permit a litigant to argue an unpleaded estoppel if it is in the interests of justice to do so. It is a matter within the discretion of the judge who must have due regard to all the circumstances of the case, including any prejudice that may be caused by the affected party being taken by surprise.

[32] The defendant's letter 19 August 2005 would also give rise to a legitimate expectation to the plaintiff that the defendant would honour the promise/representation made in their said letter. In *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666; [2000] 3 MLJ 699, the Court of Appeal held that upon a consent order being recorded, it would vest in the appellant a legitimate expectation that the promise made to it will be carried out.

[33] However, despite the plaintiff having complied with the defendants directions as stated in their said letter, the defendant suddenly started to raise issues that were never at all raised at the material time and thereby try to avoid having to pay on the said policies by rejecting the plaintiff's claim.

[34] The defendant is clearly back-tracking on the earlier commitment and expectation given to the plaintiff which came six years after their letter dated 19 August 2005. It would be unjust to permit the representor or encourager, the defendant herein to insist upon his strict legal rights.

[35] The defendant also argued that the court order firstly, only presumed Elvis to be dead on the basis he had not been heard for seven years by those who would have naturally have heard of him if he had been alive. Secondly, the said order make no presumption that Elvis died at any time during the period before 3 January 2011.

[36] The words "dianggap telah mati" in the said court order are clear that Elvis is considered dead as it is proven that there is no news has been heard about Elvis since 2002 by those who should have heard. This is obviously

A and clearly a presumption of death order. Certainly the court cannot make any other order as to exactly when Elvis died as that is not within the knowledge of the court or anyone else. The entire reason for the statutory presumption of death provision pursuant to s. 108 of the Evidence Act, is for precisely these sorts of situations. Any other reading of s. 108 would
B negate the effect and intention of the section.

[37] Thus, the learned trial judge had erred in law and fact when deciding, in her grounds of judgment (at pp. 10-21 of rekod rayuan tambahan-bahagian A) as follows:

C (a) The court order makes no presumption as to when Elvis passed away;

(b) The court order did not make any presumption that Elvis had died at any time before the date of the court order;

(c) The onus lies on the plaintiff to prove that Elvis had died on any particular date or time within seven years; and
D

(d) The onus lies on the plaintiff to show to that court that her husband had passed away before the expiry of seven years from the date of disappearance.

[38] This presumption of law is that, her husband had died and that
E presumption has not since been rebutted by the defendant when this proceeding was heard before the court because at that time no proof and no sign of him has been forthcoming. If the defendant alleges that Elvis is still alive, it is for the defendant to bring proof that Elvis is not dead. It was none before this court.

F **[39]** When a death is presumed by order of court, there arises a death claim on the policy. Again, the question of polices having lapsed for non-payment of premium after the date of disappearance as alleged by the defendant, would not arise as there is no clause or term in the policies that the nominee/ spouses to continue to pay the premiums till the decision of the court is
G obtained. Neither the plaintiff was informed nor advised by the defendant of the same. If there is such clause or term requiring such policy to be kept in force by making payment of premium till upon producing court order, then it would give a different effect to the claim.

[40] The case of *LIC of India v. Anuradha* [2004] 4 Madras Law Journal 94,
H referred to by the defendant at the court below, the fact is distinguishable. In the case of *LIC of India* firstly, the Supreme Court ruled that "in order to successfully maintain the claim for benefit under the insurance policies it is necessary for the policy to have been kept alive by punctual payment of premiums until the claim was made". Secondly, there is an express clause
I under r. 14 of the insurance manual which reads:

> Where a person is reported missing, it is to be advised to the claimant that Life Insurance will be presumed to be dead after seven years or production of the decree from the court of law and in the mean-time policy is to be kept in force by making of premium regularly.

[41] In the present case however, there is no clause or term in the policies that the nominee/spouse to continue to pay the premiums till the decision of the court is obtained.

Whether The IPL Policy And LIL Policy Are Valid And In Force

[42] The defendant at the material time had full knowledge and was fully aware that Elvis was missing for almost two years and eight months since 12 December 2002 and hence requested the plaintiff to obtain a court order for a statutory presumption of death.

[43] When he went missing since 12 December 2002, both policies are still valid and in force.

[44] When the letter was issued on 19 August 2005, the defendant neither notified the plaintiff that the said policies had allegedly lapsed due to non-payment of premium nor instructed the plaintiff to pay the outstanding premium, if any as at 19 August 2005, nor did they informed the plaintiff that she has no right to claim.

[45] I agree in the submission of the learned counsel for the plaintiff that if the defendant alleges that the IL Policy and UL Policy have lapsed on 15 May 2004 and 4 September 2004 respectively, due to non-payment of premium, the defendant should have informed the same to the plaintiff at the very least in the said letter. The defendant, however through its witness who had no personal knowledge, claims that premium notices and lapse notices were allegedly sent, but they chose not to produce the said notices by making some lame excuse that purportedly the system was changed. The defendant also chose not to neither produce Ms Leong Hui Fan, an employee of the defendant who had personal knowledge and signed the letter dated dated 19 August 2005 on behalf of the defendant. Further, Mr Simon Lee, the agent of the defendant who had personal knowledge of the contemporaneous events was also not called as a witness. It warrants the inference that any such evidence if produced by them would have been adverse to the defendant's case as provided for under s. 114(g) of the Evidence Act.

Conclusion

[46] The contents of the defendants letter dated 19 August 2005 are very clear and unambiguous.

[47] The plaintiff has complied with the defendant's requirement that she obtains a presumption of death order. Thus, as far as the plaintiff is concerned, she had done whatever the defendant had required of her. If the defendant had any other requirement at the material time, it would have informed her and the plaintiff would have complied with same. The defendant is now estopped from raising these afterthought issues.

A **[48]** The plaintiff has proved her case against the defendant. Both IL Policy and UL Policy are valid and in force and should be payable.

[49] In the circumstances, the plaintiff's appeal is allowed and the learned trial judge's decision dated 26 November 2012 is set aside and judgment entered for the plaintiff as prayed in the statement of claim for the sum of
B RM210,000 and 5% interest per annum. Costs of RM3,000 to the plaintiff.

C

D

E

F

G

H

I